

## DEPARTMENT OF STATE REVENUE

04-20140652.LOF

**Letter of Findings Number: 04-20140652**  
**Use Tax**  
**For Tax Year 2013**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

### HOLDING

The LLC provided documentation to affirmatively establish that some of the protested purchases were not subject to use tax. The remaining amounts of use tax were properly assessed.

### ISSUE

#### I. Use Tax-Imposition.

**Authority:** IC § 6-2.5-3-2; IC § 6-8.1-5-1; IC § 6-2.5-1-5; IC § 6-2.5-1-1; IC § 6-2.5-5-8; IC § 6-2.5-3-5; [45 IAC 2.2-4-1](#); [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-2](#); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012).

Taxpayer protests the assessment of use tax.

### STATEMENT OF FACTS

Taxpayer is an Indiana Limited Liability Company ("LLC"). The Indiana Department of Revenue ("Department") conducted a sales and use tax audit for the years 2011, 2012, and 2013. The Department determined that Taxpayer had not paid sales or use tax on some transactions during the audit period. The Department therefore issued proposed assessments of use tax. Taxpayer protested the imposition of use tax on certain transactions. An administrative hearing was conducted and this Letter of Findings results. Further facts will be presented as required.

#### I. Use Tax-Imposition.

### DISCUSSION

Taxpayer protests the proposed use tax assessment for the tax year 2013. The Department determined that Taxpayer did not have a use tax accrual system in place prior to the audit. The Department calculated use tax adjustments on the purchases by Taxpayer in which sales tax was not paid at the time of purchase nor was use tax self assessed. The Department also found additional taxable purchases from a number of other vendors. The Department also assessed additional tax on a purchase in another state where six percent sales tax was paid to the vendor at the time of transaction. In this instance, the Department allowed a credit for the other state's sales tax which was paid to the vendor and assessed an additional one percent Indiana use tax. Taxpayer argues that it paid use tax for the remaining one percent sales tax difference.

Taxpayer also protests that some of the items listed as taxable in the Department's calculations were actually exempt from use tax because they were related to service contracts. Taxpayer argues that the Department erred in assessing use tax on transactions it entered into with certain vendors on the grounds that the transactions involved supply and building services. Taxpayer provided invoices in support of its protest. The list of purchases upon which use tax was proposed can be found on page seven of the audit report.

Taxpayer provided the Department with invoices some of which related to the audit and some that did not. Taxpayer provided no additional argument just that ". . . relate to the sales tax portion of the audit, which

individually show various amounts of sales tax paid on itemized invoices."

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Use tax is imposed under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

[45 IAC 2.2-3-4](#) further explains:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property ("TPP") is used, stored, or consumed in Indiana, use tax is due unless sales tax was paid at the time of the transaction, or if there is another applicable exemption to sales and use taxes. A transaction subject to the state's sales tax necessarily involves the transfer of TPP. The state's use tax is triggered when a person exercises ownership over TPP.

Taxpayer protests the assessment of use tax on certain transactions it claims are service contracts. These purchases, all from a single vendor, can be found on page seven of the audit report under items 1-29. The vendor in question refilled and replaced soap and deodorizers in Taxpayer's restrooms during the tax years at issue.

[45 IAC 2.2-4-2\(a\)](#) states that:

Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10 [percent]) compared with the service charge; and
- (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

Taxpayer provided invoices and a letter from the vendor explaining that the transactions listed in the audit report are for services rendered. The invoices supplied during the protest process show that the vendor issued invoices that combine TPP and services in one invoice.

Transactions that include tangible personal property and services "which are furnished under a single order or agreement and for which a total combined charge or price is calculated" are retail unitary transactions. IC § 6-2.5-1-1(a). Further, [45 IAC 2.2-4-1\(b\)\(3\)](#) states that the amount of the retail transaction that is subject to tax includes the amounts collected for "services performed or work done on behalf of the seller prior to transfer of such property at retail." Therefore, the sales tax due on a retail unitary transaction is based on the total price of the transaction.

The service invoices represent "unitary transactions" which are explained at IC § 6-2.5-1-1(a), as follows:

[A] "unitary transaction" includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.

In addition, IC § 6-2.5-1-5 states:

(a) Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

(1) the seller's cost of the property sold;

**(2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;**

**(3) charges by the seller for any services necessary to complete the sale,** other than delivery and installation charges. . .

**(Emphasis added).**

Taxpayer's argument that transactions 1-29 are exempt services charges is incorrect. The vendor only charged sales tax on TPP for part of the invoice but did not separate service cost and TPP. Therefore, Taxpayer's protest regarding transactions 1-29 as a service exemption to sales tax is denied.

Taxpayer further protests the imposition of use tax on transactions listed on page 7 of the audit report claiming that 1 percent Indiana use tax was paid at the time of the purchase. The items in question are 33, 40, and 47 of the audit report on page 7.

The relevant code IC § 6-2.5-3-5 provides that:

A person is entitled to a credit against the use tax imposed on the use, storage, or consumption of a particular item of tangible personal property equal to the amount, if any, of sales tax, purchase tax, or use tax paid to another state, territory, or possession of the United States for the acquisition of that property.

Taxpayer was able to provide an invoice that shows Indiana sales tax was paid on transaction 40. Taxpayer was also provided Indiana ST-103 returns that ostensibly included transaction 33 and 47. Taxpayer is sustained on its protest of transaction 40. Taxpayer is denied on its protest of transactions 33 and 47 because an ST-103 does not document the individual transactions for which sales tax is reported on the ST-103.

For transactions 30, 32, 37, 43-45, and 48 Taxpayer has provided invoices during the protest process which show that the taxable amounts in the Department's audit were incorrect. The Department will conduct a supplemental audit with the information provided and assess the correct tax accordingly.

Taxpayer also provided invoices for transactions 38 and 46. These invoices did not contradict the Department's assessment, therefore, Taxpayer's protest regarding transactions 38 and 46 is denied.

Taxpayer also provided an invoice for item 31. The invoice showed that no tax was paid at the time of purchase. Taxpayer however, wrote on the bottom of the invoice "Pro-shop, for resale." Without stating as much, Taxpayer impliedly relies on the "sale for resale" exemption found at IC § 6-2.5-5-8(b) which states:

Transactions involving tangible personal property other than a new motor vehicle are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property.

Taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). While the Department has had to draw arguments from Taxpayer's poorly developed protest, the circumstances of Taxpayer's business and the items bought suggest that the items were in fact resold. Taxpayer however, did not provide in sales invoices showing that the items were sold and sales tax was collected and remitted to the state. Therefore, Taxpayer's protest regarding transaction 31 is denied.

For the remaining line items 34, 35, 39, 41, and 42 Taxpayer provided invoices which did not correspond to invoices listed in the audit report and therefore use tax is still due on these purchases according to the original audit. With regards to these items, Taxpayers protest is denied.

In conclusion, Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c) of proving the proposed assessments wrong regarding transaction 40. Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c) regarding 1-29, 31, 33, 38, and 46. Finally, Taxpayer demonstrated that the Department's taxable amounts on its audit report were incorrect; therefore, a supplemental audit will be conducted on transactions 30, 32, 37, 43-45, and 48 to properly reflect Taxpayer's invoice. The Department will conduct a supplemental audit to reflect these findings.

### **FINDING**

Taxpayer's protest is sustained in part and denied in part.

*Posted: 09/30/2015 by Legislative Services Agency*  
An [html](#) version of this document.